

Negotiating Negotiation: The Collaborative Production of Resolution in Small Claims Mediation Hearings

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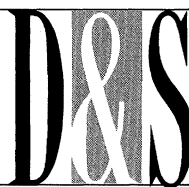
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ABSTRACT. The purpose of this paper is to analyze how participants in mediation hearings get ideas for resolution of the dispute on the table for negotiation and bargaining. The data used are 15 small claims mediation hearings which were videotaped, transcribed and analyzed using the conversation analytic method. While the tasks involved in producing suggestions for solution are tied to institutional role (mediators make proposals and solicit position reports from disputants; disputants produce position reports) the mediators and disputants collaboratively produce ideas for resolution, and use several techniques to control production of ideas and their placement. Mediators orient to the institutional requirements of neutrality and disputant empowerment as they engage in these tasks, but have ways of resisting these constraints. Disputants, in turn, can resist mediator's attempts to infringe upon their autonomy.

KEY WORDS: *bargaining, conversation analysis, dispute resolution, empowerment, mediation, negotiation, neutrality*

Introduction

Mediation is a non-adversarial conflict resolution procedure which provides an alternative to litigation in divorce and child custody cases (Saposnek, 1983), civil disputes, juvenile cases, and even criminal cases (Felstiner and Williams, 1978). Rather than handing authority for making a decision over to a judge, disputants in mediation hearings retain that authority, and negotiate an agreement with the help of a third party (Cobb and Rifkin, 1991: 47; Merry and Silbey, 1986). Mediation emphasizes cooperation and compromise (Cahn, 1992; Worley and Schwebel, 1985), and de-emphasizes the adversarial nature of disputing which tends to be exacerbated in litigation (Girdner, 1985). Mediation practitioners believe that this approach reduces the antagonism between disputants, gives them the opportunity to listen to and understand each other's position, and promotes reconciliation (Bottomley, 1985: 162; Dingwall, 1986: 10; Folberg, 1983:

9; Roberts, 1988: 538). When compared to adjudication, mediation strives to empower the disputants, to allow them to represent themselves, and to limit the authority of the mediator (Moore, 1986: 14).

However, some critics have suggested that the very characteristics of mediation that provide these advantages over more legalistic approaches to conflict resolution also create potential problems (e.g. Merry, 1989). Bottomley (1985) argues that although intended to empower the powerless, informal justice may be less just than traditional processes, given that the informality of the process allows more powerful interactants to gain the upper hand, enabling the powers that be to define and impose community norms and moral standards.

Kolb (1981) found that labor mediators differ in the amount of control they attempt to exercise over the dispute resolution process. However, because the philosophy and goals of community-based mediation programs differ from those of labor mediation, mediator strategies such as the 'deal-making' role Kolb (1983) identifies may not be appropriate in this context. A primary goal of community mediation is to provide a mode of conflict resolution which empowers disputants to make their own decisions instead of having a third party impose a solution on them.

Cobb and Rifkin's (1991) study of community-based mediation hearings shows that although there is a rhetoric of neutrality among mediation practitioners and advocates, the nature of the mediation process militates against actual neutrality. The first storyteller in the mediation hearing uses that opportunity to set the moral stage for the hearing, by characterizing their own position as right and good, and that of the opposing disputant as wrong and bad. Mediators unwittingly aid in the process of reaffirming the 'primary narrative' by orienting to the issues raised by the first story as they facilitate the hearing. Unless mediators successfully aid the second disputant in promoting an 'alternative narrative' which challenges the moral framework established by the primary narrative, they have failed in their goal of constructing the mediation hearing as a 'neutral' process.

In British divorce mediations, mediators can exert a great deal of control over the outcome of the hearing by controlling what topics are discussed (Greatbatch and Dingwall, 1989). Even without explicitly violating neutrality (e.g. by taking a position relative to a disputant's complaint or proposed solution) a mediator can shape that complaint or proposal by shifting the discussion from one topic to the next. Greatbatch and Dingwall (1989) refer to this strategy as 'Selective Facilitation'. In the example they cite in their paper, the mediator moves talk away from the proposal supported by one disputant to the other disputant's favored proposal. In this way, mediators' actions can shape the narrative which is conjointly produced by the coordinated actions of the participants.

Empowerment has been an increasingly important issue for mediation researchers, practitioners and critics (Tjosvold and van de Vliert, 1994: 305–6; see also Folberg and Taylor, 1984: 10). Empowerment can simply refer to the goal of mediation to respect disputant autonomy and to help disputants forge their

own agreement rather than having an agreement imposed on them by a third party (Grebe, 1992: 159). Mediators may need to balance the power between disputants with unequal abilities, knowledge, or status (Harrington, 1985: 128; Roehl et al., 1989) in order to create equality between them during the negotiation process (Barsky, 1996; Irving and Benjamin, 1987; Neumann, 1992; Ricci, 1985).¹ The neutrality or impartiality of the mediator is also a prevalent value among mediators, practitioners, and critics (e.g. Burton, 1986; Folberg and Taylor, 1984; Maggiolo, 1985; *Mediation Techniques*, 1984; The Center for Dispute Settlement, 1988; Zetzel and Wixted, 1984); cited in Shailor, 1994: 8). The most obvious form of mediator bias is to side with one disputant on the issues under dispute. However, the perception of bias can be created by much more subtle actions. The mediator's role can include:

avoiding value judgments, not saying more to one disputant than to another, conveying impartiality in tone of voice and body language, mediating in pairs so that each mediator can check the biases of the other, waiting until the mediators' private caucus to express dislike for a particular disputant, and the like. (Shailor, 1994: 8–9)

The mediator's role, however, may be complicated by potential contradictions between the goals of empowerment and neutrality. For example, Shailor (1994: 132) argues that

the mediators' definition of neutrality is internally inconsistent; that is, there are some features of mediation practice that *require* mediators to violate their ethic of neutrality by requiring mediators to position themselves in opposition to one or both disputants.

Matz (1994) addresses the problem of a possible contradiction between party autonomy and mediator pressure. He concludes that mediator pressure of some kind is an inevitable and beneficial part of the mediation process. People resort to mediation because they need help resolving the conflict.

Rifkin, Millen and Cobb (1991) claim that there is an inherent paradox in mediation between neutrality and the performance of the role of mediator. This is because neutrality requires the mediator to be impartial (not to take sides), and also to be 'equidistant' from both participants. If a mediator has to ask questions of a disputant to help elicit their story, and has to align or appear to align with a disputant during the elicitation of the story, they have to be careful to do the same with the other disputant, so that their alignments are 'equidistant', and neither of the disputants is favored over the other. The authors argue that this is impossible, since the alignments made during the storytelling phase (even if they occur in private caucuses, as in their data), inevitably affect the way the mediators write up the agreement, and are therefore bound to make the agreement biased.

Previous researchers have not examined how the production of ideas for resolution of the dispute is linked to the institutional requirements for neutrality and empowerment. In this article I examine how mediators and disputants collaboratively produce suggestions for resolution of the dispute, and discuss the implications of this process for mediator neutrality and disputant autonomy.

GETTING IDEAS FOR RESOLUTION ON THE TABLE

Because of the diversity of mediation programs, approaches to generating ideas for solutions vary greatly. Mediators often describe their role as helping disputants to create an agreement, rather than forging an agreement for them. Recent guides to mediation practice encourage the use of brainstorming sessions to elicit proposal ideas from disputants (Fisher and Ury, 1991). However, in some mediation programs, mediators take a much more active approach to creating agreement (Greatbatch and Dingwall, 1989; Kolb, 1981). Recent research on negotiation, bargaining, and mediation raises questions about the extent to which mediators empower disputants (Bottomley, 1985; Cobb and Rifkin, 1991).

Previous research on negotiation, bargaining, and mediation shows that creating potential solutions is an important part of the process. Carnevale and Pruitt (1992: 535–6) note that negotiation can be a creative process which generates ideas or potential solutions that did not exist before the process began. Some researchers found important differences between 'Problem-solving' and 'Contentious' strategies for proposing solutions. Problem solving is a set of negotiation strategies which includes 'brainstorming in search of solutions' (Carnevale and Pruitt, 1992: 538) and 'constructing new options that have not previously been considered' (Carnevale and Pruitt, 1992: 551).

Conflict resolution, or negotiation procedures which use problem-solving approaches to generating solutions, may be more likely to result in beneficial solutions. Agreement in mediation is more likely to be reached if the disputants or the mediators engage in problem-solving activities (including suggesting new ideas) (Tyler, 1987; Zubek, Pruitt, Pierce, and Iocolano, 1989; see also Carnevale and Pruitt, 1992: 565). Carnevale and Pruitt (1992: 538) note that 'problem solving is a major route – though not the only route – to the development of win-win solutions'. Filley (1975) and Fisher and Ury (1991) recommend problem-solving tactics, including brainstorming (see also Carnevale and Pruitt, 1992: 552). Fisher and Ury (1991: 11) recommend '[generating] a variety of possibilities before deciding what to do'.

However, creative ideas and suggestions for solutions appear to result in these benefits only if the person producing them is not committed to that particular solution. Carnevale and Pruitt (1992: 548) refer to such 'positional commitments' as contentious strategies. Contentious strategies are less likely to result in win-win solutions (resulting in 'joint benefit') than are problem-solving strategies (see also Pruitt, Carnevale, Ben-Yoav, Nochajski, and Van Slyck, 1983). Fisher and Ury (1991: 3–5) also recommend that participants in negotiations avoid bargaining over positions. Thus negotiation formats or conflict-resolution procedures which provide for the production of problem-solving strategies without a commitment to a particular solution on the part of participants should be more beneficial than procedures which produce commitments to positions.

Garcia (1997) found that mediators and disputants play different roles with regard to the generation of ideas for solutions to conflicts. Mediators are free to suggest solutions without committing themselves or others to that solution (a

problem-solving strategy). They make proposals which the disputants then accept or reject. Disputants, on the other hand, are seen to be committed to the suggestions they make (a contentious strategy). Disputants produce position reports, which are suggestions for resolution produced with the disputant's position in favor of that solution. Disputants' position reports were almost always solicited by mediators (which helps mitigate their contentiousness). Disputants could further mitigate the potential contentiousness of their positions by employing various techniques (Garcia, 1997). The participants in the current data set (small claims mediations collected in 1994–5) show the same patterns.

The goal of the current paper is to look more closely at the mediator's role in the proposal negotiation process. While the previous paper focused on the *formulation* of ideas for resolution (proposals vs position reports), this paper examines the *process* of getting ideas for solutions on the table. The process of bargaining, negotiating, and discussing possible solutions cannot begin until someone produces a suggestion. In this paper I will show that mediators use two main techniques for getting ideas for solutions on the table: mediator solicits disputants' position reports (the most common method), and mediator makes proposals (used less frequently). I describe how mediators' use of these techniques displays an orientation to the institutional constraints on their role, and how mediators and disputants can both resist these constraints for strategic purposes. I also show how the production of ideas for resolution is a collaborative and negotiated process. Even though the roles of mediators and disputants differ with respect to proposal generation, they both have a role to play in the process. There is an implicit negotiation between mediators and disputants as to how and when ideas for resolution will be put on the table.

THE INTERACTIONAL ORGANIZATION OF MEDIATION HEARINGS

While variation in structure is common, most mediation hearings contain the following elements. A mediator opens the hearing, explains the mediation process, makes introductions, and then elicits each disputant's story in turn. After the initial stories are completed, mediators may solicit second or even third 'stories' from the disputants. Usually the disputants are not allowed to interrupt each other during their stories, but the mediators may interrupt to ask questions or refocus the topic. Disputants typically address their utterances to the mediators rather than to the opposing disputant.² While disputants have the floor to tell their stories, they are free to self-select as next speaker, and to speak even when not selected by a mediator. However, they do not use the full range of turn-taking options that would be available to them in ordinary conversation (Sacks et al., 1974).

Data and methods

In this paper I analyze 15 mediation hearings which were collected as part of a larger project on proposal negotiations in mediation hearings.³ The hearings were

videotaped and transcribed using the conventions of Gail Jefferson (see Atkinson and Heritage, 1984). All names and identifying information have been replaced with pseudonyms. The program studied used mediation as an optional first step for small claims cases. If the case could not be resolved in mediation, it would immediately be sent back to court for a decision from a referee. Each hearing involved one mediator and at least two disputants. Some disputants brought a spouse, friend or colleague with them when that person was also considered a disputant.

I analyzed these data using the techniques and findings of conversation analysis. The goal of conversation analysis is to discover the common-sense understandings and procedures people use to shape their conduct in particular interactional settings (Heritage, 1984: 1, 241; 1987: 256–7; Sacks, 1984: 413; Schegloff and Sacks, 1973: 290). Members' shared interactional competencies not only enable them to produce their own actions but also to interpret the actions of others. Because participants display their orientation to the procedures they use in the utterances they produce (see also Heritage and Atkinson, 1984: 2; Schegloff and Sacks, 1973: 293–4), analysts are able to discover conversational procedures by analyzing the talk itself (Schegloff and Sacks, 1973: 290). The conversation is assumed to be a context within which participants shape their own utterances and interpret the utterances of others (Goodwin and Duranti, 1992; Heritage, 1987: 249). Thus the sequential context – the immediately prior utterances, previous utterances in the conversation and the interactional context – and the physical and temporal contexts are all assumed to be potentially relevant to the participants as they structure their talk (Heritage and Atkinson, 1984: 5).

Producing ideas for resolution of the dispute

Maynard (1984: 86) found that bargaining sequences in plea bargaining negotiations consist of an optional 'pre-opener', such as a request for a proposal or position report followed by a proposal or position report and its reply. One similarity between mediation and the bargaining exchanges in the plea bargaining sessions Maynard studied is that in both settings they can begin with either a 'pre-opener' (a solicit), a proposal, or a position report. In the plea bargaining negotiations the judge or either of the attorneys can use a solicit as a pre-opener to initiate a bargaining exchange (Maynard, 1984). In these mediation hearings the production of solicits, proposals and position reports was tied to institutional role. Both in the small claims mediations studied here and in the consumer complaint mediations analyzed previously (Garcia, 1997), proposals and solicits were produced by mediators, while position reports were produced by disputants.

MEDIATOR'S PROPOSALS AND POSITION REPORT SOLICITS

Mediators sometimes use a proposal in order to get an idea for resolution on the table. In one hearing a roofer (Disputant A) had replaced the roof on a house sev-

eral years earlier. Disputant B then bought the house. After Disputant B had owned the house for three years, a severe ice storm made the roof leak. Disputant B filed a case in a small claims court to be reimbursed for the cost of replacing the roof, which he believed was incorrectly installed. The case was referred to mediation. During the mediation hearing Disputant A balked at the idea of paying Disputant B for the roof. Later on in the hearing, the mediator made a proposal (see Excerpt 1), suggesting that Disputant A ('Ed') should offer his services (either repairing or replacing the roof – lines 2514–22) as an alternative to a cash settlement. After requesting clarification of the proposal in lines 2524–5, Disputant A rejected the proposal because 'that's still money' (line 2529).

Excerpt 1

- 2514 M: [WHAT ABOUT] ED? an' another appro:ach! an' = i = don't
 2515 (1.6) i = dunno = how- (0.4) jack would feel about this.
 2516 (0.4) .h because = it DOESN'T = haf- (0.5) **uh = th-** an'
 2517 AGREEMENT = that = chu = reach = in mediation does not have tuh
 2518 deal (0.3) .h only? (0.5) or exclusively? (0.5) .h
 2519 (0.7) with money! (1.3) we're talking here = uh = *th* uh
 2520 about = uh = professional SERVICE = as = well! (0.5) .h
 2521 is = there = uh way tuh get uh resolution (0.5) in THAT
 2522 *direction.*
 2523 (6.8)
 2524 A: *what = are = you de fining as = uh (0.4) uh professional
 2525 service! i = mean =
 2526 M: = YOURS! (0.9) YER services! yer yer work
 2527 *is = uh* (0.4) *is:* (0.6) *professional work.* (0.3) .h
 2528 (1.6)
 2529 A: tch *that's still money! (1.5) i = mean?, y'know even
 2530 [though we = do]n't? even though = you = do? i = mean = it's
 2531 M: [WELL! **>mm = mm<**]
 2532 A: it's yer still lookin' = at (0.2) yer still lookin' = at
 2533 money! y'know.

The mediator's idea for resolution is a proposal rather than to a position report, because she suggests a solution to the problem without stating what she wants to happen, or taking a position relative to the proposal. By formulating her proposal as a question, the mediator shows that the disputant addressed by the proposal (Disputant A) is free to either accept or reject it. The mediator displays an explicit orientation to the disputants' rights to either accept or reject it by saying 'I don't know how Jack [Disputant B] would feel about this' (line 2515).

Excerpt 2 is from a hearing involving two former roommates. The roommates had received an eviction notice from their landlord, at which point Disputant B moved out of the apartment. However, Disputant A renegotiated the lease with the landlord so that he could stay in the apartment. Disputant A wants Disputant B to continue paying his share of the rent, even though he is not living there any more.

As the excerpt begins the mediator solicits a suggestion for resolution of the dispute (line 1210, 'Do you see any way to resolve this?'). Disputant B produces two

suggestions in response to this solicit. The first suggestion is that he find someone to sublet a room from Disputant A, to cover the disputed share of the rent (lines 1212–15). The second suggestion is that the mediation hearing be postponed for two weeks, to enable Disputant B to talk to the landlord ('Mr. Carter Payne') and try to work things out with him (lines 1216, 1218–21). Disputant A initially rejects the suggestion of a continuation (lines 1225–35), but after intervention by the mediator and Disputant B accepts this solution (lines 1246–7).

Excerpt 2

- 1210 M: [d'] = yuh see: (0.3) any way: (0.6) to resolve this.
 1211 (0.9)
 1212 B: now i've (0.6) heard from- (0.7) see = thuh thing is i've
 1213 heard from uh couple people = they're gonnuh need uh
 1214 place tuh sublet fer thuh winter. (1.0) so i could
 1215 po:ssibly talk tuh them about subletting there. (1.3)
 1216 okay? (0.7) but on top uh that [the = only] way that i do
 1217 A: [CHUH!]
 1218 B: see tuh resolve this = is i would like tuh talk- (0.5)
 1219 eh = i would like = tuh = 't lease request uh delay on this,
 1220 (0.4) until i can talk tuh mister payne en see what we
 1221 can get resolved about this. =
 1222 M: = how d'you feel about
 1223 that bryan.
 1224 (1.2)
 1225 A: *like = i* said i need this settled as soon as possible.
 1226 (1.3)
 1227 u:h this is why i = mean (0.3) i tried = tuh bring this tuh
 1228 court i couldn't get uh summons to = 'im so: (0.4) i had
 1229 tuh put = it off fer another three four weeks. (1.3) u:hm
 1230 (0.5) it's (0.8) *uh = mean* (0.3) with any court case i
 1231 wanted this (0.3) don:e as soon as possible (0.4) i
 1232 thought we would get it settled today i didn't know
 1233 we'd go intuh mediation, (1.7) (ackly) i- wasn't (0.4)
 1234 really expecting = tuh get uh settlement today i figured
 1235 it wou[ld go () this.]
 1236 M: [we:ll what if you] go intuh court a::n = uh
 1237 referee (1.4) doesn't *side with you.* (0.4) now have
 1238 you resolved anything.
 1239 (0.7)
 1240 A: no.
 1241 (2.6)
 1242 B: now what i'm askin for bryan could i have two weeks
 1243 *tuh talk* tuh carter. (1.0) about this. (0.6) could
 1244 you give me that amount uh time tuh talk tuh carter.
 1245 (1.2)
 1246 A: m:kay we ken put this off (0.5) we c'd get uh
 1247 continuance til: (0.6) after: (0.9) first.

Disputant B presents his ideas for resolution as position reports rather than as proposals (Garcia, 1997). He states what he is willing to do (find someone to rent

the room) and what he wants to do (postpone the mediation hearing for two weeks), thus displaying 'positional commitments' to his suggestions.

INSTITUTIONAL CONSTRAINTS ON THE ROLE OF THE MEDIATOR

Mediator proposals do not occur in every hearing. And, when they do, they occur less frequently than mediator solicits of disputants' position reports. Eight out of the 15 hearings studied in this paper have no mediator proposals.⁴ Of the seven hearings that did have mediator proposals, most hearings had only one or two of them.

Mediators' limited use of proposals for getting ideas for resolution on the table may reflect institutional constraints on the role of the mediator. As discussed above, the goals of mediation include empowering disputants and displaying mediator neutrality. These institutional requirements affect how the role of the mediator is performed during the hearing. By using mediator proposals less frequently than mediator solicits, mediators empower disputants by letting them create the ideas for solution to be discussed in their hearing.

Holders of institutional roles in a variety of institutional settings must maintain a posture of neutrality. Clayman (1988, 1992) found that television news interviewers use footing shifts (Goffman, 1981) to present controversial statements in a neutral fashion. Atkinson (1992) found that small claims court arbitrators display neutrality by refraining from practices which may display affiliation with a disputant. Mediators (Cobb and Rifkin, 1991; Greatbatch and Dingwall, 1997) work to present themselves as objective relative to the issues under discussion, and as neutral relative to the parties involved. By soliciting a disputant's suggestion for resolution rather than making a suggestion themselves, mediators may successfully convey a neutral posture. Disputants, on the other hand, have no motivation for trying to make the opposing disputant appear neutral, so they do not solicit suggestions from the opposing disputant.

There are several reasons why we would expect mediators to use solicits frequently, while disputants never use them. As the facilitator of the hearing it is the mediator's responsibility to control what happens next in the hearing, thus it is reasonable that transitions to bargaining would also be initiated by the mediator. Mediator solicits may move the talk from disputants' complaints, storytelling, or evidence-giving to talk about resolutions. In addition, Garcia (1991) found that in most cases disputants do not address each other directly. In order for a disputant to solicit a position report from another disputant they would have to address that disputant directly.

Finally, Garcia (1997) showed that when a disputant produces a suggestion after a mediator solicit, it is likely to be less confrontational than it would have been if they had produced it without waiting for a solicit. When a mediator initiates a bargaining sequence with a solicit the disputant's position report is produced as a second pair part to a mediator request, rather than a first pair part. The mediator's solicit creates an interactional context in which the disputant's

position report is produced as an utterance addressed to the mediator, rather than to the other disputant.

DISPUTANT RESISTANCE OF MEDIATOR SOLICITS

Mediator solicits can be seen to 'empower' disputants because they give disputants an opportunity to suggest a solution to the dispute. However, a disputant's 'empowerment' as a result of being solicited can be a two-edged sword. Although disputants generally respond to position report solicits with position reports, they may not always feel it's to their advantage to make a suggestion for resolution, or may prefer to have the other disputant make a suggestion first. The potential benefits to the disputant include avoiding having to commit oneself to a position report. This may be an important benefit, since disputants' suggestions are treated as offers (Garcia, 1997). In addition, having the other disputant make an offer first may be advantageous strategically (they may offer more than you had expected). Thus, disputants have a variety of techniques at their disposal for avoiding or delaying the production of position reports when confronted with a mediator solicit.

Hutchby's study of arguments on radio talk shows (1996; see also Sacks, 1992) found that there are inherent advantages to being in the second position in an argument sequence. The first position arguer has to lay his or her cards on the table by stating a position and justifying it. It is then a relatively easy matter for the second position arguer to challenge that position or justification, without producing arguments of their own which might expose them to similar attack.

In mediation hearings, disputants may also find the first position slot for the production of position reports to be less advantageous than waiting for a chance to respond to the other disputant's position report. For example, there is an exchange in a dispute over the installation of a washer/dryer hookup in a tenant's apartment, in which both disputants display reluctance to be the first to 'budge'. At one point, the mediator asks John whether there is a settlement that can be made. John responds 'I think you have to ask Tish first.' A few minutes later, the mediator asks Tish 'If everybody budes a little, will you budge too?' Tish responds 'Let's see them budge first.' Each of these disputants refuses to be the first to produce a position report in that particular bargaining sequence. They want to see if their opponent will make a concession before deciding if they are prepared to make one.

The impact of first and second positions may be different in mediation than in the arguments on the radio talk shows which Hutchby (1996) studied. First of all, a mediation hearing is not an argument. The disputants are disagreeing, but for the most part, they use a different interactional organization during mediation than they would during an argument in ordinary conversation (Garcia, 1991). In the small claims mediations studied here there are instances of extended direct conversation between disputants, even argumentative exchanges, which did not occur in the consumer complaints mediations studied in Garcia (1991). However, there is still ample evidence that for most of the time participants are conforming

to the speech exchange system described in Garcia (1991), and that occasions on which they do not they are at least closely monitored by the mediator and often sanctioned, interrupted or channeled back into the format by the mediator (see Garcia, n.d.). For this reason, in most cases opposing disputants' utterances are not placed adjacent to each other.

In the circumstances, the opponent in mediation is unable to rely on using adjacency with a disputant's first position argument to construct the sort of attacks and challenges described in Hutchby (1996). However, there may still be reasons why disputants in mediation hearings would rather not be the first to produce a proposal. Firstly, because if they wait, the other party may offer more (strategic move), and secondly because the disputant may gain time to create a favorable environment for their position report, by choosing or constructing where it will appear rather than letting the mediator choose the place for them. Disputants may also want to delay producing a position report when solicited because there are other things they want to do first, such as continuing to tell their story, itemizing, repeating or elaborating complaints against the opposing disputant, or justifying their position. Mediators often have to make several attempts to move disputants from the 'storytelling' phase of the hearing to the 'resolution' phase.

A. Resisting mediator solicits with silence. Because a mediator solicit is a first pair part, it creates an expectation that a disputant will produce a second pair part – a position report – in the next turn space. Thus, in this position silence will be accountably absent, and will make repair relevant (Sacks et al., 1974; Schegloff and Sacks, 1973). In these data, disputant silence was not an effective method of resisting a mediator's solicit addressed to an individual disputant.

Most mediator solicits were individual rather than collective. While individual solicits were generally successful in eliciting position reports, collectively addressed solicits were usually unsuccessful. Collective solicits were particularly vulnerable to declinations by silence. Excerpt 3 shows a collective solicit which is not successful in eliciting a position report. When the collective solicit is unsuccessful, the mediator abandons it, and issues an individual solicit. This excerpt is from a dispute between two former room-mates over a utility bill. Both disputants remain silent for the 1.5 second pause which follows the collective solicit in lines 993–4. The mediator responds to their silence by producing an individual solicit (line 996). After a brief exchange to correct the disputant's name, Disputant B produces a position report (lines 1002–3).

Excerpt 3

- 980 M: okay:! so:!(0.6) basically?, (0.8) what? (0.8) it
 981 sounds like yer both in agreement?, (1.2) tha:t u:h
 982 (1.8) you?, (0.5) john lived with (0.3) kris an' kurt
 983 fer uh while?, .h (0.5) tha:t um (1.7) m = there = was this
 984 hunnert 'n twenny two dollar bill you said that yes,
 985 you- told her that you would pay it?, (0.4) .hh and

- 986 you said part of (0.6) your = issue is that you're really
 987 (0.9) hhurt (0.6) by (0.3) what transpired between tuh
 988 two of you. (0.4) .h a:nd um (1.0) and- (0.4) you also
 989 say that you're hurt by what happened. (0.9) uh so
 990 (1.7) e = wha- and you both have- (0.4) w- w- (0.5)
 991 slightly different views about what happened. (0.5) .h
 992 but (0.4) again (0.3) thet = doesn't mean that we can't
 993 reach an agreement. (0.9) so um (0.7) who would like
 994 tuh start with some ideas?
 995 (1.5)
 996 *y'wanna start, kurt?*
 997 (1.5)
 998 B: *hh!* (it's) john.
 999 (0.4)
 1000 M: i mean it's john. (0.4) john, sorry.
 1001 (0.7)
 1002 B: .hh (2.7) neh-! (0.6) *i = duh* I = uh = i don't wanna pay
 1003 tuh bill.

When a solicit is collectively addressed, and is not responded to, the missing second pair part is still accountably absent, but its absence is due to the actions of two individuals, rather than one. In general, mediators' collective solicits do not succeed in eliciting position reports from disputants because opposing disputants in a mediation hearing are not an association (Lerner 1993: 228), and will therefore resist attempts to make them align themselves as an association. In several instances collective solicits had to be repaired to individual solicits before either disputant would respond to them. Also, disputants may not want to appear over-eager to make an 'offer', and therefore may pass over opportunities to provide a position report.

Although collective solicits occur infrequently and are generally unsuccessful, mediators' use of them may have some strategic implications. Mediators are quick to highlight any area of agreement between disputing parties, and will try to bring them together by getting them to see that they have a common interest. The occasional use of collective solicits may be a way of attempting to create a sense of 'we-ness'. In addition, in cases such as that shown in Excerpt 3, where the mediator is opening the resolution phase of the hearing, it may seem sensible on her part to at least attempt to get the disputants to choose who goes first. If the mediator were to by-pass the collective solicit, and instead ask only one party to suggest a resolution, this might be perceived as treating the disputants unequally.

Collectively addressed disputants who use silence to delay making an offer are also avoiding making any type of response. A much more common response to solicits when the disputant doesn't want to produce a position report is to use techniques other than silence to avoid or delay producing the position report.

B. Resisting mediator solicits by 'passing'. Disputants can provide a position report in response to a solicit, but do it in such a way that they are in fact avoiding the

opportunity to produce a suggestion for resolution. For example, Excerpt 4 shows a disputant responding to a mediator solicit by stating that the issue is open for negotiation. This dispute is between a repair shop owner (Disputant C), and a couple (Disputants A and B) who bought their video camera in for a repair estimate. When they returned they were told that the camera had been repaired, and presented with a bill. When they objected, an argument ensued between them and the sales clerk. They felt that consumer protection rules were being violated. At this point in the hearing, Disputant A has suggested that Disputant C ('Pete') should buy the camera from them.

Excerpt 4

- 576 M: so: (0.4) so wha:t would it co:st fer pete t' = purchase
 577 *thuh* cam*ra*?
 578 (3.6)
 579 A: i'm willing tuh negotiate that.
 580 (2.3)
 581 M: pete how yuh feel bout buyin tuh camera?
 582 (0.4)
 583 C: why i don't (1.1) whad d'i want 't for? (0.7) i'm too
 584 old tuh s- go around doin this?

In this excerpt the mediator solicits a suggestion from Disputants A and B in lines 576–7. Disputant A responds to the solicit in line 579, but does not actually give a suggestion for resolution. She says she's flexible about what the cost of the camera should be. This is one way a disputant can sidestep a mediator's solicit of a position report. Disputant A successfully leaves open the issue of how much Disputant C should pay for the camera, thus avoiding making a positional commitment which might limit her options for bargaining later on. By expressing her willingness to negotiate, A indicates that she's open to suggestions. She thus provides some information to the mediator (and the opposing disputant) about how she intends to approach the negotiation. Other disputants, however, may pass on the opportunity to produce a position report without giving such indications. For example, in Excerpt 5 a disputant uses a more direct method of 'passing' on the opportunity to produce a suggestion. In this hearing, a landlord (Disputant B, 'Tish') is trying to get her tenants, Disputants A ('Anna') and C ('John'), to pay for a washer-dryer hookup she installed in the house they rent from her.

Excerpt 5

- 1477 M: tuhuh tuh HALF uh = tuhuh three thirty = nine forty = five
 1478 less tuhuh forty dollars *paid.* (0.6) .h u:m an' = then
 1479 some other costs: (0.8) *added on.* (3.8) would would
 1480 eye- would = any = of = you like tuh = suggest uh = wa:y (0.9)
 1481 that this could be *worked out?*" (1.0)
 1482 is = 'ere some middle ground here? (0.6)
 1483 *that = can resolve this?*" (3.5)

- 1487 *annah?*
- 1488 (2.2)
- 1489 A: *no.*
- 1490 (20.9)
- 1491 M: john?
- 1492 (0.6)
- 1493 C: .hh! (1.2) *i = uh = um!*
- 1494 (3.2)
- 1495 M: is = 'ere [some] settlement that = can = be made?
- 1496 C: [uh = i-]
- 1497 (0.4)
- 1498 M: tuh = get this over with?
- 1499 (3.5)
- 1500 C: i think yuh = have = tuh = ask tish first!
- 1501 (1.8)
- 1502 M: tish? d' = you want *to:*
- 1503 (9.5) ((Tish examines papers during pause))
- 1504 B: i'll take thuh one twenny nine plus court costs!

As the excerpt begins, the mediator sums up the financial issues under dispute, then asks for suggestions for a resolution (lines 1479–81). She begins with a collective solicit, but repairs it to an individual solicit when no one responds. The mediator's solicit reaches a transition relevance place on three occasions (Sacks et al., 1974). 'Would any of you like to suggest a way that this can be worked out?' (lines 1479–81) is a possibly complete unit type with completion intonation. It is followed by a one second pause. When none of the disputants respond, the mediator selects herself to continue and says 'Is there some middle ground here?' (line 1483). This reformulation of her solicit is also unsuccessful in eliciting a response from the disputants. The mediator tries again with 'that can resolve this?' (line 1485). When this final reformulation is also greeted with silence, the mediator solicits Disputant A individually: 'Anna?' Anna's response is 'no' (line 1489) – she declines to produce a position report, or, her position report is that there is no middle ground or resolution possible. When Anna's husband John is then addressed by the mediator (line 1491) he hesitates, leading the mediator to reissue her solicit in lines 1495 and 1498: 'Is there some settlement that can be made? To get this over with?' At this point John 'passes' by declining to produce a position report, and stating that Disputant B ('Tish') should produce one first (line 1500).

Declining to make a suggestion by 'passing' is therefore one way a disputant can resist a mediator's solicit. One potential benefit to the disputant is that they avoid making a commitment to a position. This may be an important benefit, since disputants' suggestions are treated as offers (Garcia, 1997). In addition, having the other disputant make an offer first may be advantageous strategically (since they may offer more than expected).

C. Resisting mediator solicits with talk on other issues. Another technique disputants use to resist mediator solicits is to produce talk which is not a suggestion

for resolution, instead of a position report. For example, a disputant confronted with a mediator solicit can revert to complaints about the opposing disputant, describe the history of the dispute, or present evidence instead of providing a suggestion for a possible resolution. The mediator can then choose to follow the disputant's lead and participate in the storytelling or complaint-talk, or pursue the solicit by reissuing it until a suggestion for resolution has been elicited. Thus, the decision to pursue or not to pursue a position report when a solicit is avoided is an area of mediator discretion which opens the possibility for differential treatment of the disputants. Sometimes a disputant is allowed to avoid producing a position report, and sometimes they are pursued until they produce one.

In Excerpt 6 (from the hearing cited in Excerpt 3) a disputant declines a solicit by producing talk which is not a position report. This hearing is between two former friends who are arguing over who should pay a utility bill incurred while one of them was living in an apartment both had previously shared. The mediator solicits a suggestion for resolving the conflict from Disputant A in lines 1141–2. Although Disputant A responds, what she produces is not a position report, but a detailed history of what happened with the utility bill which is under dispute (lines 1144–8; 1151–5; 1158–60; 1162–6). By recycling her solicit the mediator maintains that Disputant A has not yet responded to her request for a suggestion on how to resolve the problem: 'I understand you're saying that he was living there. What I need from you is a suggestion to resolve this' (lines 1169–71). Disputant A then produces a position report in lines 1173–6 ('Like I said like I mean the landlord even says so right there. He feels John should pay the bill . . .'). This response is hearable by the mediator as a suggestion for a solution (that John pay the bill because he was living there). The mediator then paraphrases Disputant A's suggestion (lines 1179, 1181, and 1183).

Excerpt 6

- 1141 M: i = kri- (0.2) kris i s:ti:ll?, (1.0) would like you to
 1142 offer uh suggestion for resolving.
 1143 (0.7)
 1144 A: tch (1.0) I: honestly! (0.5) yuh = kno:w i (0.3) .h i
 1145 realize thuh bill = is in MY NAME? but it was left in my
 1146 NAME? because .h (0.3) thee: place was: in kurt's name?
 1147 (0.7) and (0.4) thuh day that we found out?, (0.4) that
 1148 (0.7) um (0.4) thuh- place was turned over tuh john?
 1149 (0.4)
 1150 B?: ((sniffs)) =
 1151 A: = I called?, (0.9) thuh gas an' electric
 1152 company tuh have (0.3) thuh gas an' electric taken out
 1153 of: (0.3) our name! (0.5) .h we were given till
 1154 september first tuh move out? (0.5) we wuh = moved out,
 1155 in july.
 1156 (1.0)
 1157 M: okay. =
 1158 A: = so we were OU:T of the:re (0.3) immediately. .h
 1159 thuh DAY I CALLED tuh have thuh gas en electric bill

- 1160 taken out of my NAME? [.hh I was to:]ld
 1161 B: [*this was already changed.*]
 1162 A: (0.5) john had already called? (0.7) a:n' (0.5)
 1163 changed it? (0.5) an' = I = didn't = know anything about it.
 1164 (0.7) HE CHANGED it some time during thuh day, I called
 1165 in thuh afternoon! when I got home from work and found
 1166 out thet
 1167 (0.2)
 1168 M: *kay.* (0.4) so, (0.4) kris. (1.6) wha:t (0.7) if yer
 1169 saying, tha:t (1.3) y'know? (0.5) ah- i understand yer
 1170 saying that he was living there. (0.7) what = I! need
 1171 from you is uh suggestion to resolve this.
 1172 (0.7)
 1173 A: tch LIKE I said like (0.6) I = mean thuh LANDlord even
 1174 says so right there. he feels john should pay thuh
 1175 bill. (0.6) .h HE was there, ON thuh premises
 1176 during = thuh time. HE knows who [was] = there,
 1177 M: [okay]
 1178 (0.4)
 1179 M: so = yer- yer: asking fer john tuh pay [thuh] hunderd en
 1180 A: [yes.]
 1181 M: twenny two: (0.3) do[llars? an'] some odd
 1182 A: [yes I AM that's]
 1183 M: cents. (0.3) the:t's what y[our]
 1184 A: [mm = hm!]
 1185 M: idea = fer = uh = solution is.
 1186 (0.6)
 1187 A: tch and that's why I brought it tuh [cour.]
 1188 B?: [(snif)fs)
 1189 (0.4)
 1190 A: cuz john told us he would pay (it/'em).

Thus Disputant A ('Kris') at first declined to produce a position report. The mediator's solicit gave her the floor for a turn at talk, which she used to return to complaining or storytelling rather than to produce a position report. After the mediator pursued the solicit by reissuing it, Disputant A complied by producing an utterance analyzable as a position report. This type of maneuver could have strategic advantages for the disputant who successfully delays the production of a position report. In this case, the disputant was able to repeat her version of events before she produced her position report, thus effectively providing a 'friendly' context for her position report. Her position report is now framed by her version of the history of the problem, rather than standing on its own after a mediator solicit.

In sum, there are three techniques disputants can use to avoid or delay the production of a suggestion for resolution of the dispute when solicited by a mediator: silence (in the case of collective solicits), passing, and non-position report talk. If a disputant does not believe it is in their best interest at the current moment to be 'empowered' by producing a suggestion for resolution, there are techniques at

their disposal to avoid or delay producing such a suggestion while still conforming to the institutional constraints of 'mediation talk'. As the next section will show, mediators also have ways by which they can resist the institutional constraints of the mediator role while still conforming to the format of mediation talk.

Mediators' resistance of institutional constraints

As mentioned earlier, mediators produce proposals less often than they solicit disputants' suggestions for resolution. The fact that mediators limit their production of suggestions for solutions and instead focus on soliciting disputants' position reports (and restating or reissuing disputants' prior position reports), displays an orientation to the institutional constraints of mediation (that mediators display neutrality and empower disputants). However, mediators can also resist these institutional constraints while simultaneously following the 'letter of the law'. For instance, solicits can be formulated in such a way that they contain 'candidate proposals', or otherwise limit the parameters of possible solutions. Thus the mediator can 'have their cake and eat it too'. One way this can be done is by formulating mediator solicits of disputants' position reports as 'specific' rather than 'general' solicits.

GENERAL AND SPECIFIC SOLICITS

I found two types of mediator solicits in these data. A general solicit is a request for a suggestion for resolution which does not specify a particular type of suggestion, or limit the range of ideas the suggestion can address. As with the topic initial elicitors identified by Button and Casey, general solicits 'provide an open, though bounded, domain from which events may be selected and offered as possible topic initials' (Button and Casey, 1984: 170). General solicits solicit a suggestion for a resolution, but they do not specify the boundaries of that proposal, except in a general way (for example, in a hearing a mediator might ask for suggestions other than those that have already been discussed). Given the interactional context of the mediation hearing, mediators' general solicits, such as 'What would make you happy here?', and 'Who would like to start with some ideas?', are heard by participants as referring to the issues under dispute.⁵

Excerpt 7

- M: mm = kay.* (0.3) (m) TELL ME (0.7) m = first = let's = ask
vince! vince? what = would make = you happy here!
(0.9)
B: .h (0.6) settlement = uh = that = bill!

Excerpt 8

- 992 M: an agreement. (0.9) so um (0.7) who would like tuh
993 start with some ideas? (1.5) *y'wanna start, kurt?*
- 994 (1.5)
995 B: *hh!* (it's) john.

- 996 (0.4)
 997 M: i mean it's john. (0.4) john, sorry.
 998 (0.7)
 999 B: .hh (2.7) neh-l (0.6) *i = duh* I = uh = I don't wanna pay
 1000 tuh bill.

With specific solicits, mediators also attempt to elicit a suggestion for a resolution from a disputant rather than producing a suggestion themselves. However, specific solicits solicit solutions from a narrower realm of possibilities. This 'marked' type of solicit may specify a particular sub-area of the dispute in which a suggestion is solicited, or include a candidate suggestion of a solution for the disputant to express a position on.

Excerpts 9 and 10 are from the dispute over the video camera described earlier. In Excerpt 9 the mediator asks specifically for a price for the camera, rather than requesting 'a solution'. By soliciting a price for the camera, the mediator is supporting the idea that a possible solution would be for Disputant C ('Pete') to purchase the camera.

Excerpt 9

- 552 M: so: (0.4) so wha:t would it co:st fer pete t' = purchase
 553 *tuh* cam*ra*?
 554 (3.6)
 555 A: i'm willing tuh negotiate that.

Excerpt 10 occurs after Disputants A and B ('Maureen' and 'Jake') have rejected the idea of taking the camera back, because they are afraid that Disputant C ('Pete') would sabotage the repairs he made before returning it. The mediator asks Pete how Maureen and Jake can be assured that their camera is in working order.

Excerpt 10

- 793 M: is there anything that you can do to assure maureen en
 794 ja:ke thet tuh (0.4) thet = you: (2.3) 'f they agree tuh
 795 take tuh camera back thet: = uh (1.5) it's gonna be tuh
 796 way it was when they: (0.3) turned it in?
 797 (0.9)
 798 C: uh = mean uh = ohn = what (flight) right there en she (didn't
 799 shut *it out*) 'n watch it themselves they
 800 *can = they = can* they can see it (0.1) sure.

By asking Pete to suggest how Maureen and Jake could be reassured about the condition of their camera, the mediator implies that the idea of returning the camera to Maureen and Jake is a viable solution. By limiting the scope of possible suggestions, the mediator is in effect contributing to the proposal's construction. As such, the specific solicit lies somewhere between the general solicit and the mediator proposal – it has some characteristics of each. A mediator can present him or herself as soliciting a proposal (thus displaying neutrality, and at least officially 'empowering' the disputant), at the same time as she or he attempts to limit the parameters of the proposal by using a 'specific' as opposed to a 'general' solicit.

There are practical or strategic reasons for mediators to use specific solicits

instead of general solicits. With general solicits, disputants may simply restate the position they held when the hearing began. For example, in Excerpts 7 and 8 earlier, the mediator uses a general solicit, and both disputants recycle their initial positions from before the mediation started. Specific solicits, by their design, attempt to move disputants away from a starting position. In Excerpts 9 and 10 there is some movement away from the initial position that disputants held when they entered the hearing. In Excerpt 9, Disputant A indicates a willingness to negotiate the costs, which indicates a shift from her original claim. In Excerpt 10 Disputant C, at least initially, accepts the idea of giving the camera back to Maureen and Jack.

The specific and general solicits found in these data function similarly to the 'candidate answers' identified by Pomerantz (1988). Pomerantz makes a distinction between questions in which a candidate answer is included and those in which it is not. Offering a candidate answer creates a different interactional environment for an answer than a question without a candidate answer.

An information-seeker has options as to how much or how little guidance to give a recipient with respect to what information is relevant and appropriate. When interactants incorporate Candidate Answers in their inquiries, they give the co-interactants *models* of the types of answers that would satisfy their purposes. In providing a model, an interactant instructs a co-interactant as to just what kind of information is being sought. (Pomerantz, 1988: 366)

In the case of soliciting position reports for suggestions on how to resolve a conflict, using a specific solicit does not provide a candidate 'answer' or candidate 'proposal'. What it does do is specify or narrow the domain of the proposal or the boundaries within which the proposal should fall. This guides the disputant as to what type of proposal is being sought.

DISPUTANT RESISTANCE OF MEDIATOR'S SPECIFIC SOLICITS

Disputants sometimes resist mediators' attempts to specify the domain of their suggestions, or to include implicit 'candidate proposals' in their solicits. For example, Excerpt 11 is from a dispute between the purchaser of a house (Disputant B) and the woman he bought it from (Disputant A). Disputant B claims that Disputant A owes him money for several problems associated with the house. In Excerpt 11 the mediator asks Disputant A for a position report relative to Disputant B's claim for financial reimbursement for problems with the house. However, this isn't a general solicit of an idea for a solution. By asking 'what do you think your responsibility, what part of this is your responsibility' (lines 937–9) the mediator's solicit has a preference for a positive response. Her solicit assumes that part of the bill is Disputant A's responsibility. This solicit is therefore a specific rather than a general solicit, because it attempts to limit the parameters of a possible suggestion.

Excerpt 11

936 M: LISTENING? to what's been sa:ɪd. (1.4) a- and what
937 d' = you think? how- (1.1) .h what d' = you think yer

- 938 responsibility! uh = what part uh = this = is yer
 939 respon[sibility!]
 940 A: [tch = .hh] I THINK moving thuh = stuff out = uh = th'
 941 garage is = m (0.4) my responsibility but = it really
 942 isn't! it's my SON = in = law's!
 943 (0.7)
 944 M: *yes [but he's not*]
 945 A: [but I] guess i'm tuh BLAME for it!
 946 y'know? so = i'll take thuh blame!
 947 (0.7)
 948 M: **kay.** so moving thuh stuff out = uh = thuh garage?
 949 (0.5) u:m (0.8) .h you- (0.7) FEEL = LIKE you need
 950 tuh = take issue with yer son = in = law! but = between you
 951 [an' vin: ce?, (0.5) .h you feel like = it's! (0.5)
 952 A: [*ye:ah?]*
 953 M: y[er re]sponsibility! (0.6) .hh KNOWING about
 954 A: [*mm hm?]*
 955 M: thee = uh (0.4) bee gee an' = ee bill running, with = thee ay
 956 cee = on! (0.8) [with] = thee AY CEE an' = theh windows
 957 A: [wha-]
 958 M: open, .h you = says = you = wouldn't do that tuh anybody!
 959 (0.9) w = what part = uh that d' = yuh = feel is = yer? (0.7) yer
 960 responsibility.
 961 (0.4)
 962 A: m = none uh = that!
 963 (1.4)
 964 M: i'm = sure you = did[n't] mean tuh = do [that!]
 965 A: [suh-] [i] didn't do
 966 THAT! an = th = 't = least i = didn't KNOW i did that!

Disputant A resists the mediator's assumption that at least some of the problems raised by Disputant B are her responsibility. In lines 940–2 Disputant A at first appears to accept responsibility for removing things from the garage, but then says it's her son-in-law's responsibility, not her own. In lines 945–6 Disputant A says she'll 'take the blame for it'. The mediator summarizes, and restates this position (lines 948–51, 953) and then introduces another issue that had been raised by Disputant B: the air conditioning bill. When the mediator asks 'what part of that do you feel is your responsibility?' in lines 959–60, Disputant A responds with an emphatic 'None of that!' Thus the mediator's attempt to specify the domain of the proposal (assuming that some of it is Disputant A's responsibility) is challenged, and Disputant A presents her position report, which is that she has no responsibility.

Later on in the same hearing, the mediator and Disputant A were discussing whether she deliberately left the windows open in her house, thus running up the electricity bill for the new owner, Disputant B. The mediator then summarized what Disputant A has already agreed to: 'You think hauling the things out was your responsibility.' Disputant A agrees to this statement. Excerpt 12 shows what happens next. The mediator solicits further admission of responsibility for the

problems Disputant B has sued for: 'What else, without my asking certain things, what else do you think is your responsibility?' (lines 1007–9). This is a specific solicit, because the mediator assumes that some additional things are Disputant A's responsibility. The solicit has a preference for an admission of responsibility as a response. Disputant A declines to admit responsibility (line 1010), after which the mediator abandons the potential bargaining sequence and directs her next utterance to Disputant B ('Vince').

Excerpt 12

- 1007 M: what- what else! (0.6) without MY a:sking: (0.7)
 1008 certain things! what- what else d' = you think is yer
 1009 responsibility. =
 1010 A: = that's all!
 1011 (1.3)
 1012 M: *mm kay.* (0.5) .hh what = i'd LIKE tuh do is = tuh give
 1013 vince? uh chance = tuh talk again now? (0.4) .h and
 1014 m = maybe we = c'n get

In sum, disputants can resist the mediator's attempts to limit the domain of solicits by rejecting the assumptions made by the specific solicit. By resisting the mediator's attempts to limit the parameters of their options for producing suggestions for resolution, the disputants are empowering themselves. In this way they may regain autonomy that the mediator's specific solicit attempted to limit.

Discussion: negotiating negotiation

In sum, the institutional goals of mediator neutrality and disputant empowerment are evident in the actions of mediators in these data. Mediators display their neutrality and empower disputants by soliciting disputant's position reports to elicit ideas for resolution. Mediators seldom produce suggestions for resolution themselves, and when they do they frame them as proposals rather than as position reports, indicating that the disputant has the right to decide whether to accept or reject the proposal (Garcia, 1997). However, they are in a position to resist institutional neutrality and empowerment constraints, and may do so for strategic purposes. By using a specific solicit instead of a general solicit, mediators can limit the parameters of disputants' suggestions. The subtle use of specific solicits thus gets around the neutrality and empowerment constraints, while displaying an orientation to follow them.

Mediators also have strategic choices to make when soliciting disputant's position reports. If a disputant resists or avoids a solicit, the mediator can respond by pursuing it or by letting it drop, perhaps returning to it later in the hearing. A mediator's pursuit of a solicit that has been resisted by a disputant may be a form of mediator pressure.

Disputants may choose to resist mediator's attempts to 'empower' them. They can also choose to resist mediators' specific solicits, thereby rejecting attempts to influence the parameters of a potential solution. Disputants can also resist or

avoid general solicits, thus exercising control over where their position report is placed in the hearing. Disputants may not want to commit themselves to an idea for resolution of the dispute before the opposing disputant has made a suggestion, or they may wish to withhold their position report until a more favorable environment for it can be created. In this way disputants are able to respond to mediator solicits strategically.

Both mediators and disputants are, therefore, engaged in a back and forth exchange resulting in the collaborative production of ideas for resolution of the dispute. Each has some influence over when and by whom suggestions for resolution will be produced, and over whether or not the parameters of those suggestions will be limited. While a mediator can independently solicit a disputant's suggestion for resolution, thereby selecting a possible location for that suggestion, the mediator alone does not determine where that suggestion is produced. While disputants may choose to produce positive responses to solicits – by placing position reports after them – they may also choose to use various techniques to delay or avoid producing position reports. Some disputants may be more skillful than others at placing their suggestions for resolution in an advantageous position (e.g. after the opposing disputant has already produced a position report, or after they have created a 'friendly' space for their suggestion by presenting background information favorable to their side of the story).

NEUTRALITY/EMPOWERMENT CONTRADICTIONS

Neutrality can be described as not displaying a preference for one disputant over the other, not systematically treating one disputant differently from the other, or not taking a position on issues. However, even if a mediator limits their role to that of facilitator, and keeps out of the substantive issues under dispute, they may still risk infringing on disputant autonomy. The negotiation between the mediator and the disputants over how, where and when ideas for resolution will be put on the table illuminates one more arena for concern about the degree of mediator control and disputant autonomy in mediation. Decisions made by the mediator, such as whether to use a general or a specific solicit, can limit the disputant's options for responding. If a mediator produces a general solicit, a disputant has wide latitude for making suggestions to resolve the dispute. A specific solicit, on the other hand, subtly narrows the field, and hence the disputant's options. Although disputants can avoid or delay producing suggestions when solicited, mediators can choose whether to pursue a solicit or not. If a solicit is pursued, the disputant's decision not to make a suggestion at this point in the hearing is not honored. If the disputant decides to resist the mediator's pursuit, they may appear uncooperative. Thus, there are strategic costs for a disputant who chooses to further resist a mediator's pursuit. If the mediator decides not to pursue a solicit, that disputant has been let 'off the hook'. The opposing disputant may perceive this as a source of unequal treatment – a failure of neutrality.

In sum, mediator solicits of position reports empower disputants by letting them produce the suggestions, but disempower them by controlling (and selec-

tively enforcing), when in the hearing a position report will occur – so the disputant doesn't get to control the environment in which their position report is to be produced. By their choices about when to solicit disputants' position reports, and whether to pursue position report solicits when resisted by disputants, mediators can have an impact on the disputants' strategic choices and ability to place their position reports where they want them in the hearing. Thus the mediator's actions in the proposal generation process may either help or hinder a disputant's position. This work is a necessary part of the mediation process, but it is not purely neutral, because mediators' actions have the potential to affect outcomes.

The disputant's resistance (if it occurs), can provide a counter-balance to mediator pressure, and enable the disputant to create a favorable context for their position report. But such resistance is not without consequences, because it displays the resisting disputant as failing to cooperate with a mediator request. If one disputant in the hearing is treated as somehow 'delinquent' by the mediator (e.g. by repeated position report solicits, such as in Excerpt 6 previously), this may affect the willingness of the opposing disputant to make concessions (this hearing ended in a stalemate – no resolution was achieved).

In sum, mediators are displaying an orientation to the institutional constraints of empowerment and neutrality, while at the same time they may at least partially subvert them. The mediator's display of neutrality is dependent, in part, on the disputant's willingness to produce position reports when solicited. If the disputant chooses to resist the position report solicit, the mediator has to choose whether to pursue the solicit or let it drop. If the mediator pursues, they may risk being seen to pressure a disputant. If they let it drop, then they may make the opposing disputant think the other has been let off the hook. This analysis therefore supports the findings of other researchers that there are inherent contradictions between empowerment and neutrality.

Neutrality has to do not just with the obvious issues, like overtly siding with one disputant against another, but with more subtle issues such as where a position report or a position report solicit gets placed, and how the mediator handles a disputant's (potential) resistance to produce a position report. With regard to empowerment, the mediator should be aware that empowerment is a two-edged sword – the mediator's attempts to solicit the disputant's input in the form of position reports may or may not be welcome at any given time, and may or may not be helpful to the disputant's case.

RESEARCH ON NEGOTIATION AND BARGAINING

Direct examination of the mediation hearing as an interactional event can contribute much to an understanding of mediation and how it works, and to addressing the issues of equity raised by critics. However, much previous research on mediation, and on bargaining and negotiation more generally, has been based on research approaches which ignore the interactional process. For example, evaluation studies of mediation tend to treat mediation as a 'black box', studying the impact of various variables (e.g. difficulty of dispute, skill of mediator) on out-

comes (e.g. Bahr, 1981; Felstiner and Williams, 1978; Girdner, 1985; Kelly and Gigy, 1989; Thoennes and Pearson, 1985). But as Dingwall (1986) argues, such survey or questionnaire-based research doesn't capture what actually happens in the hearing. Such studies neglect the process of mediation, or only study it indirectly via post hoc reports of participants.

Research on negotiation is concerned with predicting the effect of various negotiation strategies (e.g. Pruitt, 1991) and negotiator characteristics and perspectives (e.g. Carrol and Payne, 1991; Pinkley, 1990; Rubin, Kim, and Peretz, 1990) on outcomes. This generally experimental research also neglects to explore the interactional process. Research on bargaining exchanges focuses on power differences between participants in different positions in networks, but does not study the process of bargaining itself, nor the participants' role in creating social structure and bargaining outcomes through their actions (e.g. Cook and Emerson, 1978; Cook, Emerson, Gillmore, and Yamagishi, 1983; Molm, 1987; Skvoretz and Willer, 1991).

I have shown how, in small claims mediation, bargaining and negotiation is done in the talk itself, not through abstract concepts of power and networks or external variables. This approach to the study of how ideas for resolution are put on the table in mediation differs from the experimental or computer simulation approaches to bargaining and negotiation referred to in the Introduction. Much research on bargaining and negotiation uses methods of data collection and analysis (e.g. computer simulations) which ignores the interactional process through which bargaining takes place. Because those researchers are interested in variables such as 'power' and 'position in a network', they deliberately construct their studies to isolate these 'variables' and eliminate 'extraneous' factors. The interactional process through which the bargaining or negotiation is normally done in the real world is one of the extraneous factors which is eliminated from their studies. These studies treat talk as irrelevant for bargaining and negotiation. However, as this study has shown, in at least one institutional context – that of small claims mediation – a close examination of mediation talk is essential for understanding how bargaining and negotiating are accomplished. Computer simulations that assume that one party makes an offer, for example, and the other party accepts or rejects it, are not providing an accurate description of a negotiation process in which both parties are engaged in each phase of the process – including the process of getting ideas for solutions on the table for negotiation. Both participants determine the location of suggestions for resolution in the hearing. The timing and order of suggestions for resolution can be consequential for the agreement creation process, as can the interactional process through which that timing and ordering is achieved.

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NOTES

1. Note, however, that there are also those who criticize mediators' attempts to empower disputants, arguing that in the long term they will not benefit the weaker party (e.g. Regehr, 1994).
2. Note that the organization of mediation hearings varies with the type of program. For example, disputants in these data were more likely to engage in directly addressed dyadic exchanges with each other, without mediator sanction or intervention, than were the disputants studied in Garcia (1991). Greatbatch and Dingwall's (1997) study of divorce mediation in England found dyadic exchanges between the disputants occurring without mediator intervention. Donohue (1989) found variability in how mediators responded to direct exchanges between disputants that were two or more utterances in length. Some mediators were more flexible in allowing disputants to speak directly to each other, as long as the exchange was not contentious.
3. Grant # SBR-9411224 from the 'Law and Social Sciences' program of the *National Science Foundation* provided funding for this project. Transcribing Conventions are explained in the Appendix.
4. While mediators rarely produce their own proposals, they frequently restate or reissue suggestions previously made by disputants.
5. Pomerantz (1988) discusses how recipients use the context of questions to infer what is being asked, and what type of answer is looked for.

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Appendix

TRANSCRIPTION CONVENTIONS

Speakers in transcript excerpts are identified with initials: M is for Mediator, while A, B, and C identify the disputants. Transcripts have been simplified for ease of reading. Pseudonyms have been used to protect the anonymity of mediation participants. The symbols used are based on Gail Jefferson's transcription system (see Atkinson and Heritage, 1984, pp. ix–xvi).

<i>Symbol</i>	<i>Definition</i>
.hh hh	Inhalations and exhalations, respectively
ta::lk	Colons indicate that a syllable is drawn out
that-	Dash indicates that a word was cut off abruptly
<u>lot</u>	Underlining indicates stress or emphasis

- YOU Capital letters indicate increased volume
 cost Asterisks indicate decreased volume
 (1.4) Numbers in parentheses indicate length of pauses (in seconds)
 (talk) Words in parentheses are tentative transcriptions
 () Empty parentheses indicate non-transcribable talk
 ..?! Punctuation indicates intonation, not grammatical structure
 A: [a copy of it] Brackets indicate simultaneous speech
 B: [I have]
 A: yeah = Equal signs indicate that one utterance or word is attached to another
 B: = in order



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